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C O N F I D E N T I A L SECTION 01 OF 02 SARAJEVO 001342

SIPDIS

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TAGS: [PGOV](#) [PREL](#) [KJUS](#) [BK](#)

SUBJECT: BOSNIA - BIH CONSTITUTIONAL COURT: A DAYTON  
SUCCESS STORY GONE AWRY

REF: A. SARAJEVO 152

[1](#)B. SARAJEVO 93

[1](#)C. SARAJEVO 202

Classified By: Charges d'Affaires Judith B. Cefkin for Reasons 1.4 (B)  
and (D)

[1](#)1. (C) SUMMARY. The BiH Constitutional Court has played an important role in helping Bosnia become a stable, functional state, but is now widely perceived within the local and the international community as a Dayton Peace Process success story gone awry. The appointment process for judges has become heavily politicized with judges being appointed based on party ties rather than on merit. Ethnic and other non-judicial considerations appear to be factored into some of the court's decision-making, and court proceedings have been plagued with delays. Despite these serious problems, the Court has resisted outside efforts to reform it, maintaining that it is independent of the rest of Bosnia's judicial system and therefore cannot be regulated by other judicial bodies. In the absence of reform to ensure that higher quality judges are named to the court, it is unlikely that the court will improve, considering the highly-polarized political environment in which it is operating. END SUMMARY.

#### Background

[1](#)2. (U) The BiH Constitutional Court is Bosnia's highest court and has been key to the strengthening of the rule of law and democracy in Bosnia. It was first established in 1964 when Bosnia was part of Yugoslavia but had its role and jurisdiction redefined in 1995 as part of the Dayton Peace Process. The Court decides disputes between the State and one or both entities, between the entities, and between state-level institutions. It also has appellate jurisdiction over constitutional issues arising out of judgments handed down by other courts, reviews the compatibility of specific laws with the Constitution upon the requests of other courts, and decides whether Serb, Croat or Bosniak representatives in the BiH House of Peoples were justified in invoking a claim that legislation impinged on a vital national interest. Upon the closing of the Office of the High Representative, the Constitutional Court will become the only arbitrator in disputes between the different levels of government.

#### Politicized Appointment Process

[1](#)3. (U) Long heralded as a Dayton Peace Process success story, the Constitutional Court has lost credibility in recent years due to the increasingly politicized manner in which the

court's six domestic judges are appointed. (Note: The Court is composed of nine members who serve until age 70 unless they resign or are removed for cause by the consensus of the other judges. Four judges are appointed by the Federation's House of Representatives, two by Republika Srpska's (RS) National Assembly, and three international judges by the President of the European Court for Human Rights in consultation with Bosnia's Tri-Presidency. End Note)

14. (U) Political parties nominate candidates for new positions and win their appointments by political bargaining. The only formal requirement is that the candidates must be "distinguished jurists of high moral standing." The absence of other defined criteria--such as the number of years of service in the legal profession and the type of legal experience (whether or not a candidate has worked in the judiciary)--have enabled parties to support candidates with strong party ties rather than those who are the most qualified. When a new judge was appointed to the Court in May, High Representative Lajcak used the opportunity to voice concerns about the non-transparent nature in which judges are selected. At that time he declared, "It is high time for the bar to be raised."

#### The Court's Impartiality Questioned

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15. (C) There are growing concerns that the domestic judges' decision-making process is partial and is influenced by ethnic considerations. The Court's rules of procedures call for ethnic parity and rotation between the three constituent peoples for the President of the Court and for the election

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of three vice presidents among the three constituent peoples. Voting on decisions when court members convene as a Chamber (three judges) or a Grand Chamber (five members) must be unanimous. This creates openings for representatives from one of the constituent peoples to block or delay a decision. The court can also be delayed from meeting in plenary session (nine judges) if judges from one of the three constituent peoples are not present.

16. (C) As noted in Ref A, OHR and others in the international community believe that pressure from the RS may have factored into the Court's failure to date to rule on two petitions regarding the constitutionality of a 2007 RS law on Frozen Foreign Currency Accounts (FFCA). That law conflicted with a 2006 state law based on an earlier Constitutional Court decision that mandated state competency over old foreign currency accounts of individuals whose accounts were expropriated during the war. RS pressure, specifically the refusal of an RS judge to support a consensus vote, also appears to have played a role in the Court's failure to issue interim measures to prevent the RS from issuing frozen foreign currency bonds.

17. (C) OHR's legal experts also cite the Court's failure to handle high-profile cases expeditiously, such as that of Syrian-born and former mujahedeen Imad al Husein (AKA Abu Hamza), who has been deemed a threat to Bosnia's national security. They said privately that the European Court probably decided in January 2008 to grant Abu Hamza's request for an interim measure to prevent his deportation from Bosnia because it lacked confidence in the Court's ability to make an expeditious decision. They explained that the European Court normally prefers that domestic courts take all necessary measures within their mandates before it intervenes in a case. Some local and international interlocutors have expressed concern that the Constitutional Court may have been unable to take a decision on this matter because of influence of the (largely Bosniak) Party for Democratic Action on the Bosniak members of the court, although we have also heard from some sources that it was one of the international judges that delayed a decision at the last meeting.

Comment

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18. (C) Although the Constitutional Court remains a critical state-level institution and plays an important role in ensuring that the rule of law is protected and strengthened in Bosnia, it lacks public confidence in its ability to carry out its work effectively, efficiently, and impartially. Unfortunately, the Court is not affected by judicial reform efforts underway because it insists that it is an extraordinary court and is separate from the rest of Bosnia's judicial system. In the absence of reform to ensure that higher quality judges are named to the court, it is unlikely that the court will improve, considering the highly-polarized political environment in which it is operating.

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